In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-499

ANGELO MASCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 447 F. 2d 1111.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1971. The petition for a writ of certiorari was filed on October 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the trial judge should have ordered acquittal on the ground

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of entrapment or because of alleged government misconduct.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of a three-count indictment of paying a bribe (Count Two) and conspiracy to pay a bribe (Count One) to an agent of the Internal Revenue Service (Lawrence Ruggiero). Count One charged petitioner, his son (John Mascia), and their accountant (William Williams) with conspiracy to bribe Ruggiero; Count Two charged the defendants with giving $1,500 to the agent in connection with the audit examination of certain federal income tax returns.[1] Following his conviction, petitioner was sentenced to concurrent prison terms of one year and fined $5,000 on each count. The court of appeals affirmed (Pet. App. A).

At trial, the principal evidence was the testimony of Agent Ruggiero and a tape recording of a conversation between petitioner, his son John, Accountant Williams, and Ruggiero on September 18, 1969, the date on which petitioner paid the bribe. Petitioner offered no evidence.

In January 1968, Agent Ruggiero was assigned to examine the books and records of petitioner, his son John, and their partnership, Alang Metal Company (R. 50-53).[2] During 1968 and 1969 Ruggiero also worked as an undercover agent in an investigation

[1] The charges against the other two defendants were severed.

[2] "R." refers to the record appendix in the court of appeals.

by the Internal Revenue Service of Williams (R. 53–54). In this role he met Williams many times and pretended that he was willing to accept bribes. Prior to the time Ruggiero met petitioner for the first time, Williams had informed Ruggiero that he represented Mascia in connection with Internal Revenue Service audits, to which Ruggiero responded that he had been assigned the Mascia audits (R. 204–209). Williams characterized these audits as a potential "gold mine" (R. 210–212).

Thereafter, Ruggiero met with petitioner three times and recorded the conversations at these meetings. During the first meeting on February 28, 1969, Ruggiero asked petitioner and a Mr. Denby, another of petitioner's accountants, to furnish him purchase invoices of Alang Metal Company to substantiate the purchases claimed by the company. Ruggiero prepared a list of 94 missing invoices, which were entered on the company books as involving purchases of $70,000 to $80,000. Petitioner agreed to locate the missing invoices, after which he was to contact and again meet with Ruggiero. (R. 55–60.)

A second meeting occurred on September 3, 1969. Williams was unable to attend, and accordingly Ruggiero met petitioner alone (R. 62–63). Petitioner complained about the audit techniques of another Internal Revenue Service agent (Agent Powell), during an earlier investigation, in questioning third parties about petitioner's income. Ruggiero pointed out that such questioning is a necessity in many instances and that he would continue Powell's investi-

gation (R. 64–66). In response to a request for the missing purchase invoices, petitioner gave the agent only twenty-five invoices and a list of invoices which did not correspond to the list that Ruggiero had previously prepared. They then agreed that petitioner would again attempt to find the missing invoices (R. 66–67). When the agent told petitioner that he had information about a large, unaccounted-for receipt ($80,000), petitioner replied that this money came from the sale of an investment that he owned in partnership with one Tom Milo, who resided in Connecticut. Petitioner explained that Milo had first placed this money into his private account. In response to Ruggiero's indication that information concerning this transaction would be needed to determine its tax consequences, petitioner stated that he "thought that this matter had been straightened out" (R. 68–69).

In the course of the second meeting, Ruggiero said that Agent Powell had "stirred up mud" (R. 217), and indicated that his own audit would be lengthy and thorough. Petitioner stated that he had nothing to fear from such an investigation. Ruggiero agreed that Agent Powell had harassed petitioner, and advised that if Williams had represented him at the time of Powell's investigation, Williams could have saved "a lot of aggravation" (R. 224); that many people get "shafted by guys like Powell" (R. 229–232); and that Williams could be valuable to him (R. 235–237).

After this meeting, Williams suggested to Ruggiero that he threaten petitioner with collateral investigations, and that this would scare petitioner (R. 242–247). On September 18, 1969, on the way to petitioner's home for the third meeting, Williams told Ruggiero that "This guy will spring for something," and asked the agent for a share of whatever money he might receive (R. 180–199).

At this meeting, Williams, in the presence of petitioner's son, began the discussion by saying that he trusted Ruggiero, and that the agent was at a crossroads where he could either get rid of the investigation or commence collateral investigations. Ruggiero responded that the Service, through Agent Powell, had already commenced collateral investigations in Florida and Connecticut, and that he had been assigned to follow up these investigations. Williams then asked, "do you want to give him the information, cooperate with him or do you want him to start a collateral investigation." Ruggiero added that it made no difference to him, that he was at the point of his investigation where he needed information, that "when they start they start. * * * It's out of my hands." (Ex. 19, pp. 11–16.)[3] As the meeting continued, Ruggiero and Williams questioned petitioner and his son about various items, including brokerage accounts, sources of income, rental income, and the Tom Milo partnership (Ex. 19, pp. 16–33). As to the

[3] "Ex." refers to the exhibits in the trial court.

latter item, petitioner repeatedly stated that that "was supposed to be all straightened out" (Ex. 19, p. 34).

After further discussion, Williams asked Ruggiero if he could close out the Mascia audits and the latter replied that it could be done. Williams then said, "the only thing * * * we gotta see how many golf balls it takes to play a game" (Ex. 19, pp. 48, 50–51). Ruggiero asked "You want to close it today?", to which Williams indicated yes and petitioner concluded, "Well that's it then" (Ex. 19, p. 65).

At this point, after saying that he was not accustomed to doing things like this, petitioner removed a roll of currency from a bureau drawer and briefly took Williams outside to another room (R. 91; Ex. 19, p. 66). When they returned, Williams whispered "two thousand dollars" to Ruggiero (R. 92; Ex. 19, p. 67). Later, petitioner declared, as he had before giving the bribe to Williams, that he had intended not to cooperate or pay anything to the government, but instead was going to wait "till I get assessed," after which "they won't get another quarter from me" (Ex. 19, pp. 38, 73). Near the conclusion of the meeting, petitioner brought the conversation back to the $80,000 transaction with Milo, saying that "[t]here was a deal made there" with the agent and that he had received "word it is all straightened out" (Ex. 19, p. 77).

When Ruggiero and Williams left petitioner's home, Williams gave Ruggiero $1,000, explaining that petitioner had offered $2,000 and that he had accepted

the offer without "dicker[ing]." The next day, Williams gave Ruggiero an additional $500, keeping $500 for himself. (R. 95–97.)

ARGUMENT

1. Petitioner's claim that he was entrapped was fully developed during trial and, after submission to the jury on instructions which the court below characterized as "unexceptionable" (Pet. App. A, p. 24), was implicitly rejected by the verdict of guilty. Despite this, petitioner contends that the evidence clearly established entrapment and that hence he was entitled to acquittal as a matter of law. The court of appeals correctly held that this contention is insupportable on the record in this case.

As this Court pointed out in *Sherman* v. *United States,* 356 U.S. 369, 372, "the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials * * *," citing *Sorrells* v. *United States*, 287 U.S. 435, 441, 451. Thus, in determining this issue "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal" (*Sherman, supra*). In this case, the court below thoroughly canvassed the record with the pertinent criteria in mind, and properly concluded that "there was sufficient evidence to support the jury's conclusion that * * * [petitioner] was ready and willing to bribe Agent Ruggiero and that his posture of innocence was play acting" (Pet. App.

A, p. 23). Moreover, this issue necessarily turns on the particular facts and circumstances presented, and does not warrant further review.

2. Nor is there substance to petitioner's other contention, that the government's conduct was so unconscionable as to require an acquittal as a matter of law. The government properly could investigate both Williams and petitioner at the same time. And there was no misconduct in pursuing the investigation. It was necessary to continue the investigation until the bribe was paid, both to make a case against Williams, and to determine if Williams was conspiring with a dishonest taxpayer. There was ample basis for the continued investigation of petitioner, since he never produced invoices necessary to ascertain whether his returns were correct.

The question posed by the trial judge, whether the government may prosecute a taxpayer where the conduct of a government agent in dealing with the taxpayer's advisor is the causal factor of a bribe (see R. 547), is not presented in this case. The evidence as a whole does not show that the agent corrupted Williams and brought about the bribe. In his conversations with Williams, Ruggiero merely pretended that he would go along with the bribe. The threat made during the meeting of September 18, 1969, of collateral investigation, which in fact was first suggested by Williams, was not the prime motivating force in petitioner's conduct. Rather, the record shows that petitioner was willing to cheat on his taxes independently of any advice given by Williams, from

which, the court below noted (Pet. App. A, p. 23), the jury could properly infer that petitioner "might also be willing to bribe a revenue agent."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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